Mascom (M) Sdn Bhd & Anor v Kamawang Enterprise Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO S–02–398 OF 2001 AND NO S-02–239 OF 2003
ABDUL AZIZ MOHAMAD, DENIS ONG AND TENGKU BAHARUDIN SHAH JJCA
28 SEPTEMBER 2006

Partnership — Dissolution — Order for account — Whether parties entitled to an account — Rules of the High Court 1980 O 43 rr 1, 2, 3 & Partnership Act 1961 s 30

By a partnership deed dated 3 March 1997 executed by the first appellant ('Mascom'), the first respondent ('Kamawang') and the second respondent ('Seri Pagi'), a partnership by the name of SMK Engineering ('SMKE') and comprising those three companies was formed for the sole purpose of undertaking the construction of a road in Sabah for the federal government ('the project'), with Mascom as the managing partner. The second appellant ('Sinsua') was the managing director of Mascom. The project was awarded to SMKE. On 21 November 1997, SMKE (which included Mascom) entered into a joint-venture agreement with Mascom ('the JVA'), whereby Mascom was to provide management expertise and project financing for the project and ensure its successful completion. By clause 7.1 of the JVA, 28.7% of the contract sum was apportioned to SMKE and 71.3% to Mascom. Two accounts were opened. One was the Joint-Venture Account in the name of SMKE ('the SMKE Account'). The other was an account in the name of Mascom ('the Mascom Account'). By clause 7.4 of the JVA, Mascom was entitled to deduct RM4,300,000 in twenty-four instalments for its absolute use and the balance was to be used for paying the expenses and costs that Mascom had to pay for the project, and, upon completion of the project, any balance shall be divided equally among the partners and any shortfall shall be borne equally by them. On 12 July 2000 Kamawang and Seri Pagi filed a writ action against Mascom and Sinsua seeking, among other things, the dissolution of the partnership of SMKE and claiming, in effect, for an account of the SMKE account and the Mascom account. On 14 September 2000, Kamawang and Seri Pagi applied by a summons in chambers in the action, under Rules of the High Court 1980 ('the RHC') O 43 rr 1, 2, 3, for an order to the effect that an account be taken of the SMKE Account and the Mascom account and for ancillary orders such as orders for the filing of accounts and documents by Mascom and Sinsua. Appeal No S 02-398-2001 ('the first appeal') was the appeal of Mascom and Sinsua against the decision of the judge upholding the orders. After the documents and accounts that were ordered to be filed had been filed by Mascom and Sinsua, on 20 August 2001 Kamawang and Seri Pagi applied by a summons in chambers in the action, under RHC O 43 rr 1, 2, 3, 4, for various orders, including orders for the payment from the SMKE Account to Kamawang and Seri Pagi of a sum of RM2,230,000 each. The judge made a finding that there was a balance of RM2,398,123.30 for Kamawang and RM2,412,558.30 for Seri Pagi and

that Mascom had overdrawn RM3,899,187.70. Appeal No S 02-239-2003 ('the second appeal') was the appeal of Mascom and Sinsua against that decision of the judge granting the payment orders.

Held, dismissing both appeals:

(1) So long as there was a partnership, which in the appeal the appellants' counsel conceded the existence of, the respondents were entitled to an account by virtue of s 30 of the Partnership Act 1961 and that the allegations of fraud were not a preliminary question to be tried before the taking of account could be ordered because the claim to an account was not founded on those allegations but on the duty of partners in any event to render true accounts. That was the only issue in the first appeal. As the appellants failed on that issue, the first appeal was dismissed (see para 14).

(2) Even if Mascom had made an advance of RM2,476,019, it did not bind the respondents and therefore could not be set up against them. This was because according to cl 11.2.2 of the Partnership Deed the unanimous approval of all members of the Management Committee, which comprised a representative of each of the three partners, was required to enable the partnership to 'borrow any money or obtain any advance or credit' or 'to incur any indebtedness'. There was no such unanimous approval for the alleged advance by Mascom of RM2,476,019 and therefore Mascom made the advance, or accepted it in the name of the partnership, in breach of the Partnership Deed (see para 22).

(3) Even if there had been a provision for the SMKE Account that division of moneys could only be done upon completion of the project since the respondents and Mascom had been drawing on it before the completion of the project, the provision would have been waived by common consent (see paras 22, 27).

[Bahasa Malaysia summary

Melalui satu surat ikatan perkongsian bertarikh 3 Mac 1997 yang ditandatangani oleh perayu pertama ('Mascom'), responden pertama ('Kamawang') dan responden kedua ('Seri Pagi'), satu perkongsian yang bernama SMK Engineering ('SMKE') dan melibatkan ketiga-tiga syarikat tersebut ditubuhkan bagi satu tujuan sahaja iaitu menjalankan pembinaan jalan di Sabah untuk kerajaan persekutuan ('projek tersebut'), dengan Mascom sebagai pengurus perkongsian. Perayu kedua ('Sinsua') adalah pengarah pengurus Mascom. Projek tersebut diawadkan kepada SMKE. Pada 21 November 1997 SMKE (termasuk Mascom) memasuki satu perjanjian usahasama dengan Mascom ('JVA tersebut'), di mana Mascom akan membekalkan pakar pengurusannya dan pembiayaan projek untuk projek tersebut untuk memastikan penyelesaian yang berjaya. Melalui klausa 7.1 JVA tersebut, 28.7% jumlah kontrak diberikan kepada SMKE dan 71.3% kepada Mascom. Dua akaun dibuka. Satu ialah akaun usahasama di atas nama SMKE ('akaun SMKE'). Yang lagi satu akaun di atas nama Mascom ('akaun Mascom'). Melalui klausa 7.4 JVA tersebut, Mascom berhak menolak RM4,300,000 dalam dua puluh empat ansuran untuk

kegunaannya sendiri dan baki akan digunakan untuk membayar perbelanjaan dan kos yang kena dibayar oleh Mascom untuk projek tersebut, dan, selepas selesainya projek tersebut, sebarang baki akan dibahagikan sama rata di antara rakan-rakan kongsi dan sebarang kekurangan jumlah yang perlu dibayar ditanggung sama rata oleh mereka. Pada 12 Julai 2000 Kamawang dan Seri Pagi memfailkan satu tindakan writ terhadap Mascom dan Sinsua menuntut, antara yang lain, pembubaran perkongsian SMKE dan menuntut, untuk satu laporan akaun SMKE dan akaun Mascom. Pada 14 September 2000 Kamawang dan Seri Pagi memohon melalui saman dalam kamar tindakan itu, di bawah Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') A 43 kk 1, 2, 3 untuk satu perintah bahawa satu laporan diambil dari akaun SMKE dan akaun Mascom dan perintah-perintah sampingan seperti perintah untuk memfailkan laporan akaun dan dokumen oleh Mascom dan Sinsua. Rayuan No. S 02-398-2001 ('rayuan pertama') adalah rayuan oleh Mascom dan Sinsua terhadap keputusan hakim mengesahkan perintah-perintah tersebut. Setelah dokumen dan laporan akaun yang diperintahkan untuk difailkan telah difailkan oleh Mascom dan Sinsua, pada 20 Ogos 2001, Kamawang dan Seri Pagi memohon melalui saman dalam kamar dalam tindakan ini, di bawah KMT A43 kk 1, 2, 3, 4, untuk beberapa perintah, termasuk perintah untuk bayaran daripada akaun SMKE kepada Kamawang dan Seri Pagi masing-masing untuk jumlah RM2,230,000. Mahkamah telah membuat keputusan bahawa terdapat baki RM2,398,123.30 untuk Kamawang dan RM2,412,558.30 untuk Seri Pagi dan bahawa Mascom telah terlebih keluar RM3,899,187.70. Rayuan No. S 02-239-2003 ('rayuan kedua') merupakan rayuan oleh Mascom dan Sinsua terhadap keputusan hakim memberikan perintah-perintah bayaran.

Diputuskan, menolak kedua-dua rayuan:

(1) Selagi terdapat perkongsian, di mana di dalam rayuan ini dipersetujui kewujudan perkongsian tersebut oleh peguamcara perayu, responden-responden berhak mendapatkan satu laporan akaun mengikut seksyen 30 Akta Perkongsian 1961 dan tohmahan mengenai fraud bukannya satu soal awalan yang didengar sebelum pengambilan akaun dapat diperintahkan oleh kerana tuntutan untuk satu laporan bukannya bersandar atas tohmahan tersebut tetapi atas kewajipan rakan-rakan kongsi dalam apa juga keadaan untuk memberikan laporan akaun yang benar. Itu merupakan isu tunggal dalam rayuan pertama. Oleh kerana perayu gagal dalam isu tersebut, rayuan pertama ditolak (lihat perenggan 14).

(2) Walaupun Mascom telah membuat bayaran pendahuluan sebanyak RM2,476,019, ia tidak mengikat responden-responden dan dengan itu tidak boleh dipakai terhadap mereka. Ini adalah kerana mengikut kl 11.2.2 surat ikatan perkongsian tersebut, persetujuan yang sebulat suara daripada kesemua ahli-ahli jawatankuasa pengurusan, yang terdiri daripada setiap wakil dari ketiga-tiga rakan kongsi tersebut, adalah diperlukan untuk membolehkan perkongsian tersebut untuk 'borrow any money or obtain any advance or credit' atau 'to incur any indebtedness'. Tiada persetujuan sebulat suara untuk pendahuluan yang dikatakan oleh Mascom sebanyak RM2,476,019 dan

dengan itu Mascom telah dalam membuat pendahuluan, atau menerimanya di atas nama perkongsian, melanggar surat ikatan perkongsian tersebut (lihat perenggan 22).

(3) Walaupun terdapat peruntukan untuk akaun SMKE bahawa pembahagian wang hanya dapat dilakukan selepas tamatnya projek tersebut oleh kerana responden-responden dan Mascom telah mengeluarkan wang sebelum tamatnya projek tersebut, peruntukan tersebut telah diketepikan melalui persetujuan bersama (lihat perenggan 22, 27).]

Notes

For a case on order for account, see 10 *Mallal's s Digest* (4th Ed, 2002 Reissue) para 901.

Legislation referred to

Courts of Judicature Act 1964 s 69(5)
Partnership Act 1961 s 30
Rules of the Court of Appeal 1994 r 7(5)
Rules of the High Court 1980 O 43 rr 1, 2, 3, 4

Appeal from: Civil Case No K22–121 of 2000 (High Court, Kota Kinabalu)

Azhar Azizan Harun (Kaushalya Rajathurai with him) (Sulong & Sinsua) for the appellants.

Datuk Kong Hong Ming (Lee & Kong) for the first respondent.

Sairah Yahya (Counsel for the Director General of Insolvency, Department of Insolvency, Sabah) provisional liquidator of the second respondent.

Abdul Aziz Mohamad JCA (now FCJ, delivering judgment of the court):

[1] By a partnership deed dated 3 March 1997 executed by the first appellant ('Mascom'), the first respondent ('Kamawang') and the second respondent ('Seri Pagi'), a partnership by the name of SMK Engineering ('SMKE') and comprising those three companies was formed for the sole purpose of undertaking the construction of a road in Sabah for the Federal Government ('the project'), with Mascom as the managing partner. The second appellant ('Sinsua') was the managing director of Mascom. The project was awarded to SMKE.

[2] On 21 November 1997, SMKE (which included Mascom) entered into a joint venture agreement with Mascom ('the JVA'), whereby Mascom was to provide management expertise and project financing for the project and ensure its successful completion. By cl 7.1 of the JVA, 28.7% of the contract sum, which was RM71,828,455, was apportioned to SMKE and 71.3% to Mascom. Two accounts were opened at the OCBC Bank in Kota Kinabalu. One was the joint venture account in the name of SMKE ('the SMKE Account'). The other was an account in the name of Mascom ('the Mascom Account'). By arrangement between the three partners of SMKE and the bank, any contract sum paid to SMKE by the

A Government would first go into the SMKE Account, from which 71.3% would then be transferred to the Mascom Account, the balance 28.7% to remain in the SMKE Account.

[3] As for the moneys in the Mascom Account, according to cl 7.4 of the JVA, B Mascom was entitled to deduct RM4,300,000 in 24 instalments for its absolute use and the balance was to be used for paying the expenses and costs that Mascom had to pay for the project, and, upon completion of the project, any balance shall be divided equally among the partners and any shortfall shall be borne equally by them.

[4] On 12 July 2000, Kamawang and Seri Pagi, the respondents, filed a writ action C against Mascom and Sinsua, the appellants, seeking, among other things, the dissolution of the partnership of SMKE and claiming, in effect, for an account of the SMKE Account and the Mascom Account.

[5] On 14 September 2000, Kamawang and Seri Pagi applied by a summons in D chambers in the action, under O 43 rr 1, 2, 3 of the Rules of the High Court 1980, for an order to the effect that an account be taken of the SMKE Account and the Mascom Account and for ancillary orders such as orders for the filing of accounts and documents by Mascom and Sinsua. They also applied for an injunction to preserve the moneys in the accounts and for the approval of a receiver for the SMKE E partnership. The Senior Assistant Registrar granted all the prayers. On appeal to the judge in chambers, Charles Ho J on 2 May 2001 varied the order of the senior assistant registrar by omitting the injunction and the approval of a receiver, thereby impliedly upholding the other orders. Appeal No S 02–398 of 2001 ('the first appeal') was the appeal of Mascom and Sinsua against the decision of Charles Ho J.

F **[6]** After the documents and accounts that were ordered to be filed had been filed by Mascom and Sinsua, on 20 August 2001, Kamawang and Seri Pagi applied by a summons in chambers in the action, under O 43 rr 1, 2, 3, 4, for various orders, including orders for the payment from the SMKE Account to Kamawang and Seri Pagi of a sum of RM2,230,000 each. On 14 March 2003 Ian Chin J granted the G payment orders. Appeal No S 02–239–2003 ('the second appeal') was the appeal of Mascom and Sinsua against that decision of Ian Chin J. In his judgment, the learned judge also dealt with the Mascom Account, in regard to which there was a controversy as to whether certain sums taken out by Mascom and Sinsua from the account were genuine expenses, but he ordered a trial to determine whether certain H items in the Mascom Account should be falsified. The second appeal, therefore, concerned the SMKE Account and had nothing to do with the Mascom Account.

[7] The two appeals were heard together. We dismissed the appeals.

I **[8]** In his oral submission, the appellants' counsel informed the court that he was going only on three grounds and that he abandoned all other grounds. One ground was for the first appeal, and that was in paragraph 2 of the memorandum of appeal for the first appeal. It concerned certain allegations of fraud in the amended statement of claim of Kamawang and Seri Pagi, the respondents. The other two grounds were for the second appeal, and these were in paragraphs 11 and 12 of the

supplementary memorandum of appeal for the second appeal. Those grounds concerned, respectively, a sum of RM2,476,019 and certain 'triable issues involving the accounts'.

THE ALLEGATIONS OF FRAUD

[9] Up to, and including, para 13 of the amended statement of claim, the averments were about the partnership deed and the JVA and their essential provisions, to highlight the partners' duties to each other and their right to the partnership assets. Then in paras 15, 16 and 17 the respondents mentioned about the opening in March 1998 by the three partners in SMKE's name of two deposit accounts with the Standard Chartered Bank, Kota Kinabalu, of their paying two sums totalling RM2,520,000 into the two accounts, of withdrawals allegedly made by Mascom without the respondents' knowledge or consent from those two accounts in July 1999, and of the appellants' failure to account for the withdrawals despite a demand by the respondents. Those two accounts were apparently other than the SMKE Account and the Mascom Account. It was in paras 18 and 19 that the respondents averred the making of demands on Mascom on various dates in the year 2000 to disclose the SMKE Account and the Mascom Account and Mascom's failure to do so. Then in para 20, the last paragraph of factual averment, the respondents 'further, or alternatively' averred that the appellants had been fraudulent in managing the affairs of the SMKE partnership and the joint venture. The particulars of fraud related to matters other than the SMKE Account and the Mascom Account but included by adoptive reference the averments in paras 15–19.

[10] According to O 43 r 1(3), the court may not order the taking of an account if satisfied that there is some preliminary question to be tried. The appellants' counsel submitted that as there was a preliminary question to be tried as to the allegations of fraud, Charles Ho J ought not to have ordered the taking of account.

[11] Although in their affidavit in support of their application for the taking of account the respondents had included the allegations of fraud as in the amended statement of claim, in his submission before Charles Ho J their counsel said that their case for an account depended on the existence of a partnership and the duty of partners to render true accounts, which duty is spelt out in s 30 of the Partnership Act 1961, and did not depend on the allegations of fraud, which were allegations that were pertinent to the prayers for dissolution of the partnership and for the approval of a receiver; and that therefore, as the appellants had been duly notified, the respondents would not be referring to the allegations of fraud. Before us the respondents' counsel likewise submitted as to the basis of the respondents' case for an account.

[12] It is not clear whether the respondents had taken the same stand before the senior assistant registrar, but in his judgment Charles Ho J said:

> The main, if not the sole ground relied upon by the defendants to oppose the plaintiff's application for inspection and for accounts to be taken off [*sic*] the Mascom Account was that there was no partnership as defined under ss 3 and 4 of the Partnership Act 1961.

A However, the Senior Assistant Registrar found, based on the partnership deed and the JVA … there existed a partnership between the plaintiffs and the first defendants.

Charles Ho J agreed with the senior assistant registrar.

B **[13]** It appeared, therefore, that Charles Ho J, and probably the senior assistant registrar too, did not treat the allegations of fraud as a live issue since the respondents grounded their claim for an account only on the duty of partners to render true accounts. But in the appeal the appellants' counsel still clung to the allegations of fraud as a preliminary question to be tried that prevented the taking of account until it was tried.

C

[14] We agreed with the respondents' counsel that so long as there was a partnership, which in the appeal the appellants' counsel conceded the existence of, the respondents were entitled to an account by virtue of s 30 of the Partnership Act 1961 and that the allegations of fraud were not a preliminary question to be tried D before the taking of account could be ordered because the claim to an account was not founded on those allegations but on the duty of partners in any event to render true accounts. That was the only issue in the first appeal. As the appellants failed on that issue, the first appeal was dismissed.

E THE SUM OF RM2,476,019

[15] This issue related to the second appeal, which was the appeal against the orders of payment made by Ian Chin J. To explain how the question of the sum of RM2,476,109 arose, it is necessary to set out Ian Chin J's findings that formed the basis for his orders of payment.

F

[16] In para 9.2 of their affidavit dated 20 August 2001, the respondents averred that on the basis of the statements of account filed by the appellants (which were made up to 31 August 2000) the net profit that accrued to the partners of SMKE should be RM19,308,943, based on a total income of RM70,879,071 from the G project for the period up to 31 August 2000. In para 9.3, the respondents averred that, on the basis of those statements of account, out of that net profit RM4,038,185 had been disbursed to Kamawang and RM4,023,756 had been disbursed to Seri Pagi. In para 9.4, the respondents set out a table that worked out the balance due and payable to them as at 31 August 2000. The calculation may easily be explained. H The total net profit of RM19,308,943 was divided by three, resulting in a sum of RM6,436,314.30 as the share of each of the three partners. Since RM4,038,185 and RM4,023,756 appeared in the accounts as having been disbursed to Kamawang and Seri Pagi respectively, the amounts remaining due to them respectively were RM2,398,123.30 and RM2,412,558.30. Of those sums, each of them, by their summons in chambers of 20 August 2001, sought payment of RM2,230,000.

I

[17] In the table in the said para 9.4, the respondents also showed a sum of RM10,335,502 as having been drawn by Mascom from the SMKE Account. Since Mascom's entitlement was RM6,436,314.30, the table showed it as having overdrawn by RM3,899.187.70.

[18] In para 10 of their said affidavit, the respondents averred that SMKE had sufficient funds to pay them the total sum of RM4,460,000 that they asked for since the relevant bank statement showed a balance of partnership profit in the SMKE Account of RM4,478,333.58 as at 31 May 2001. A

[19] The appellants' reply to the respondents' said paras 9.2, 9.3, 9.4 and 10 was in para 7.9 of the appellants' affidavit dated 21 September 2001 and was as follows: B

> As regard to paras 9.2, 9.3, 9.4 and 10 of the plaintiffs' affidavit, I have been advised by my solicitors and verily believe that despite the facts that the total income over the period was RM70,879,071.00 and that of this income, the net profit was at RM19,308.,943.00, the plaintiffs could not be entitled to RM6,436,314.30 respectively as against their paid disbursements of RM4,038,185.00 and RM4,023,756.00. C

[20] It was based on the plaintiffs' said paras 9.2, 9.3 and 9.4 that Ian Chin J made a finding that there was a balance of RM2,398,123.30 for Kamawang and RM2,412,558.30 for Seri Pagi and that Mascom had overdrawn RM3,899,187.70. He said: 'Those facts are not only undisputed and indisputable but being reiterated by the defendants themselves' in their said para 7.9. In the appeal, the appellants' counsel submitted that the learned judge erred in saying that the appellants' para 7.9 supported his findings and contended that the paragraph instead raised a dispute. In our view, while in para 7.9 the appellants did make an attempt to raise a dispute the form of which was, however, vague, it was an attempt based on an acceptance of the figures on the basis of which the respondents worked out correctly the balance due to them. D E

[21] As to the sum of RM10,335,502 that the respondents averred the appellants had drawn, on the basis of which they and the learned judge concluded that the appellants had overdrawn by RM3,899,187.70, the appellants in their para 7.9 were silent. It was in relation to that sum of RM10,335,502 that the question of the sum of RM2,476,019 arose. Ian Chin J had reproved the appellants for alleging that they had put moneys into the SMKE Account rather than withdrawn moneys, viewing it as an attempt made through their counsel 'at twisting the event' because the allegation was not made in any affidavit. In the appeal, the question of the alleged payments by the appellants was confined to the sum of RM2,476,019, which had not been mentioned in any of the appellants' affidavits, and our attention was drawn to p 752 of the Record of Appeal, Section D, which was a document entitled 'NOTES TO THE FINANCIAL STATEMENT — 31 AUGUST 2000' and which showed a drawing by Mascom of RM2,476,019. The appellants had been granted leave to file for the appeal an affidavit by SMKE's accountant, in which he claimed that that entry was an error and that the sum was in fact a payment and not a drawing. F G H

[22] Agreeing with the respondents' counsel, we were of the view that even if Mascom had made an advance of RM2,476,019, it did not bind the respondents and therefore could not be set up against them. This was because according to cl 11.2.2 of the partnership deed the unanimous approval of all members of the Management Committee — which comprised a representative of each of the three partners — was required to enable the partnership to 'borrow any money or obtain any advance or I

credit' or 'to incur any indebtedness'. There was no such unanimous approval for the alleged advance by Mascom of RM2,476,019 and therefore Mascom made the advance, or accepted it in the name of the partnership, in breach of the partnership deed. The advance was prohibited by the partnership deed. At p 264 of *Lindley & Banks on Partnership* (14th Ed), it is stated:

> It goes almost without saying that, where authority to borrow would otherwise be implied, the firm will not be bound if borrowing is prohibited by the partnership agreement and the lender is aware of that fact.

[23] In any case, even if Mascom had made an advance of RM2,476,019 and that advance could be taken into account, it would only reduce Mascom's overdrawing of RM3,899,187.70 to RM1,423,168.70 and we could not see that fact having any effect on the balance due to the respondents.

TRIABLE ISSUES INVOLVING THE ACCOUNTS

[24] This issue also related to the second appeal. The appellants' counsel submitted that no payment of profit was due to any of the partners for two reasons.

[25] The first reason was that according to cl 7.4(b) of the JVA the division of moneys could only be done upon completion of the project but the project was, according to the appellants' counsel, completed only in 2002 whereas payment to the respondents was ordered on the basis of the accounts as at 31 August 2000.

[26] We found that reason to be without merit. It was not true that the project was completed in 2002. According to the Certificate of Practical Completion at p 595 of the Record of Appeal, Section C, the project was completed on 9 November 2000. Further, cl 7.4(b) concerned the Mascom Account, whereas it was the SMKE Account that was concerned with the payment that was ordered to be made to the respondents. The Mascom Account was the account from which the expenses and costs payable by Mascom for the project were to be paid. It was therefore understandable that the division of the balance in the account should await the completion of the project and that, as provided by cl 7.4(c), any shortfall in the moneys in the account upon completion of the project should be made good in equal shares by the partners. But the SMKE Account was the account into which the clean profits of the partnership were to be kept, and the 28.7% represented the clean profits. There was therefore no such provision for the SMKE Account as cl 7.4(b) for the Mascom Account.

[27] But even if there had been such a provision for the SMKE Account, since the respondents and Mascom had been drawing on it before the completion of the project, the provision would have been waived by common consent. As to the payment ordered to the respondents being based on the accounts as at 31 August 2000 and not as at some date after the completion of the project on 9 November 2000, it was the appellants themselves who had filed accounts up to 31 August 2000 only, whereas the respondents' summons in chambers seeking payment was filed on 20 August 2001, long after the completion of the project, and Mascom, who, as the

managing partner, had control of the accounts, had ample time to produce an up to date account before the respondents' application came to be heard and, on 14 March 2003, finally decided.

[28] The appellants' other reason for contending that no payment of profit was due to the respondents was that the Detailed Income Statement for the Year Ended 30 April 2002 for SMKE appearing at p 808 of the Record of Appeal, Section D, showed a loss of RM912,640, and therefore the SMKE Account had no money to pay the respondents. But that was merely looking at the position for one year. The proper thing to do should have been to look at the cumulative state of the account over the years, which the appellants themselves did in Appendix I to their Skeletal Submission in the appeal, where they showed the cumulative position from the year ended 1998. The figure for each year was given, including the figure RM912,640 for the year ended 30 April 2002. The respondents, for reasons which need not be set out here but which are set out in paras 1.1, 1.2 and 1.3 at pp 10 and 11 of the respondents' Further submission in reply dated 11 September 2004, disputed those figures. But even if those figures were accepted, they resulted, as shown in the said Appendix I, in the cumulative position of a profit of RM17,209,791 as at 30 April 2002.

[29] The purpose of the said Appendix I was to show by way of submission that, if the position as at 30 April 2002 were taken, the respondents, instead of having any balance due to them, had in fact overdrawn by about RM450,000 each. Aside from the respondents' dispute of the figures that was mentioned just now, there was, we found, one palpable and substantial reason why Appendix I was not reliable. Mascom was there credited with a sum of RM4,300,000 said to be 'for 1st Appellant Absolute use' and each of the respondents was debited with a sum of RM2,150,000 (total RM4,300,000) as contribution to the sum with which Mascom was credited. Mascom was indeed given the entitlement to a sum of RM4,300,000 'for its own absolute use' by cl 7.4(a) of the JVA but it was to be from the 71.3% paid into the Mascom Account. It was wrong to claim that sum from the respondents' share in the 28.7% paid into the SMKE Account as Appendix I sought to do. It was that error, not to mention the errors affecting the yearly figures that was mentioned just now as being disputed by the respondents, that resulted in Appendix I showing the respondents having overdrawn from the SMKE Account as at 30 April 2002. Without that error, even Appendix I would show the respondents each having at least RM1,700,000 due to them.

[30] As the appellants failed on the two issues for the second appeal, the second appeal was also dismissed.

[31] The dismissal of the two appeals was with costs for the respondents. We ordered that the deposits for the appeals be paid to the first respondent to account of taxed costs. We also directed that there be only one bill of costs for the appeals because they were heard together at one hearing.

[32] There is another thing that we would mention. Besides Appendix I, the appellants' skeletal submission also had Appendix II, in which it was shown, as

Mascom's admission, that Mascom had drawn RM7,859,483 from the SMKE Account. Since the first respondent, Kamawang, had drawn RM4,038,185 and had now obtained an order for payment of another RM2,230,000 from the SMKE Account, the first respondent contended that Mascom had drawn at least RM1,591,298 more than the first respondent, who therefore invited us to invoke the court's powers under s 69(5) of the Courts of Judicature Act 1964 and r 7(5) of the Rules of the Court of Appeal 1994 and order Mascom to refund that sum by paying it into the SMKE Account. That we declined to do.

Appeals dismissed.

Reported by Sally Kee